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Supreme Court, U.S.
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No. 97-839

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROANOKE RIVER BASIN ASSOCIATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF THE PETITIONER TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the altered discharge from a hydropower project resulting from federal licensing action authorizing a non-project use of water from the project reservoir is "any discharge" within the meaning of § 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1)?

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INTRODUCTION

The Roanoke River Basin Association ("RRBA") has urged the Court to review this case in part because the ruling below will severely undermine the ability of States to assure minimum standards of water quality — a fundamental goal of the Clean Water Act ("CWA"), 33 U.S.C. 1251 *et seq.* The Court of Appeals held there is not "any discharge" to trigger a State's review of federally issued licenses under CWA Section 401 *unless* a substance not previously present is added. RRBA Pet., App. at 19a. RRBA said constricting the term "any discharge" in this way will generally *exempt* releases from dams and reservoirs from State scrutiny, including discharges

from more than 1,000 existing hydroelectric facilities. RRBA also said the decision will foreclose review by States of pollutant discharge permits (called National Pollutant Discharge Elimination System, or "NPDES" permits) that are amended or reissued by the Environmental Protection Agency ("EPA") under CWA Section 402, whenever pollutant loadings are not increased. RRBA Pet. at 12, n.7.

In response, the Federal Energy Regulatory Commission ("FERC") argues for the first time that its regulations and policies, and those of the EPA, will assure that Section 401 review by States is not substantially curtailed as a result of the decision below. FERC says it intends to continue allowing States to review "licenses for new hydropower projects" as well as the relicensing of existing facilities, notwithstanding the decision by the District of Columbia Circuit in this case. FERC Brief at 14-15. With respect to license amendments, FERC says it will employ its regulation to pick and choose which dam releases States may review.[1] Similarly, FERC says that "EPA regulations require Section 401(a)(1) certifications— and thereby permit the imposition of

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[1] FERC Brief at 15-16, relying on 18 C.F.R. § 4.38(f)(7)(iii) (1995). Under the regulation, State review does not turn on whether there is "any discharge." Instead, State review would be allowed only if FERC decides that "the amendment would have a material adverse impact on the water quality in the discharge from the project. . . ." FERC apparently intends to ignore the Court of Appeals' "serious reservations concerning FERC's attempt to redefine the statutory phrase 'any discharge'" (RRBA Pet., App. at 16a) and to arrogate to itself — rather than to the several States — the right to determine the potential environmental effects of a discharge.

Section 401(d) minimum flow conditions — for permitting of ongoing activities and amendments to such permits."[2]

ARGUMENT

FERC CANNOT LIMIT THE EFFECTS OF THE DECISION BELOW AS IT HAS SUGGESTED, AND THE DECISION'S EFFECTS WILL NECESSARILY BE DRAMATIC.

In reply to FERC's new contention, RRBA makes two points.

First, neither FERC nor EPA can limit the impact of the decision below. Federal agencies have no discretion to *require* State certification or incorporate State conditions in permits when there is not "any discharge" within the meaning of Sections 401 and 502 of the CWA. If the Court of Appeals is correct that there is not "any discharge" without an "addition" of a new "substance," then States — by statute — have no certification authority in the absence of such an "addition" of a "substance." However willing FERC, EPA or any other federal agency might be to accommodate State review and include State-drafted conditions in its permits, the applicant for federal licensing (including original licensing, amendments to licenses, and relicensing) could properly object, challenge and ultimately invalidate any such review or conditions.

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[2] FERC Brief at 17, *citing* 40 C.F.R. §§ 122.62, 124.53, and 124.55(a) (1995). FERC appears oblivious to the contradiction between its treatment of license amendments and that of EPA, the agency charged to implement the CWA.

Second, the effect of constricting the term "any discharge" as the Court of Appeals has done will *necessarily* be dramatic. Hydropower releases, even new ones, do *not* involve the "addition" of a "substance" to waters. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 171 (D.C. Cir. 1982); *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 590 (6th Cir. 1988). Accordingly, the decision below will, at a minimum, exempt the relicensing of more than 1,000 hydropower projects from State review and State permit conditions.[3] These are facilities that determine such important downstream water quality parameters as volume of flow, temperature, dissolved oxygen content, sediment load, pollutant concentrations, and (in coastal areas) salinity. These effects alone are sufficient to establish the importance of this case, yet the even wider effects cited by RRBA will occur as well.[4]

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[3] North Carolina and other States have conflicting interests in weighing whether to advise this Court of the full and probable impact of the decision below. On one hand, they would like for the Court to accept review of this case and reverse the decision below to maintain their full authority under Section 401. But on the other hand, the States are hesitant to suggest the drastic effect the ruling below will have on their ability, particularly in FERC relicensing proceedings, to protect water quality downstream from FERC licensed dams. They fear such a concession would be used against them if this Court refuses to grant review in this case.

[4] For example, should EPA propose to *amend* an NPDES permit to decrease only slightly the discharge of a pollutant believed by a State to warrant more strict treatment to maintain its water quality standards, there would not be "any discharge" according to the Court of Appeals. The State would be powerless to demand lower effluent levels. The same result would obtain for all *relicensings* that do not propose increased pollutant loads. Even *initial licensings* may be affected, as when electrical generating

FERC has denied that the decision below will have a significant adverse impact on the authority of States to maintain water quality standards. But FERC has been no friend of such State authority,[5] and its denials here are both transparent and empty. When a stream is impounded and forced through the turbines of a hydroelectric facility, there is no "addition" of a "substance" to the water, regardless of whether the agency activity at hand is initial licensing, license amendment, or relicensing. There is either a discharge in all of these situations, or there is no discharge in any of them. Certainly, FERC makes no sense when it urges that a dam release that is *altered* by a license amendment involves no discharge, while a dam release remaining *unchanged* through relicensing does.

FERC expresses in this Court for the first time its position that "operation of [a hydropower dam and reservoir] results in a discharge — the flow of water back into the waterway after leaving the project impoundment. . . ." FERC Brief at 14. FERC does not, and cannot, deny that there is no "addition" of a "substance" under this definition. Thus, FERC implicitly admits the error in the analysis of the majority below. That error is a *very* important one. Its widespread adverse impact on the ability of States to maintain water quality standards *cannot* be ameliorated by FERC's regulations or policies.

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capacity is installed at an existing dam, as in *City of Fredericksburg v. FERC*, 876 F.2d 1109 (4th Cir. 1989).

[5] FERC has often argued that such review interferes with its management of hydropower production. *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997).

CONCLUSION

The Court should grant RRBA's Petition for Writ of Certiorari for the reasons stated.

Respectfully submitted,

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